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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Tariff Filing Requirements for | ) | CC Docket 93-36 |
| Nondominant Common Carriers | ) | |

To: The Commission

**COMMENTS OF GENERAL COMMUNICATION, INC.**

General Communication, Inc. ("GCI") submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") released on February 19, 1993 (FCC 93-103).

GCI is a nondominant interstate, intrastate and international

defined repeatedly by the Commission as carriers lacking market power. Competition in the interexchange market has been enhanced over the past ten years by the Commission's permissive detariffing policy for these carriers lacking market power. This has led to increased customer choice and lower prices.[1] GCI agrees with the Commission's tentative conclusion that "existing tariff regulation of nondominant carriers inhibits price competition, service innovation, entry into market, and the ability of firms to respond quickly to market trends."[2] Tariff filings by nondominant carriers under the Commission's current rules inhibits the introduction of new services for a period of time, inhibits rate reductions in response to the marketplace and creates additional costs and administrative burdens. The Commission should streamline the tariff filing requirements for nondominant common carriers.

Tariff filing requirements for dominant carriers should remain as currently outlined by the Commission in its rules. Dominant carriers still have market power. They are able to use that power to the detriment of competitors and consumers alike. It is appropriate to distinguish between dominant and nondominant carriers and subject each to differing regulatory treatment. The FCC has stated:

> [W]e believe that it would defy logic and contradict the evidence available to regulate in an identical

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[1]Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5881-5882 (1991).

[2]Tariff Filing Requirements for Nondominant Common Carriers, CC Docket 93-36, FCC 93-103, released February 19, 1993, paragraph 12.

> manner carriers who differ greatly in terms of their economic resources and market strength.[3]

Dominant carriers possess the power to frustrate the goals of competition and universal service by setting prices irrespective of costs.

Since market forces are sufficient to constrain nondominant carriers from acting contrary to the public interest, regulatory oversight is not necessary. Nondominant carriers "do not have the ability to establish and maintain rates that are significantly above or below the market place price,"[4] and under these circumstances the costs of regulation far outweigh any possible benefits from it. Many state commissions agree with the conclusions of the Commission. The Kentucky Public Utilities Commission noted that "due to their lack of monopoly power, nondominant carriers will not be in a position to violate the [requirement that rates be] fair, just and reasonable."[5]

The Commission has legal authority to modify its tariff filing requirements as outlined above. The Communications Act specifically states:

> Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication . . . and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such information, and

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[3]Competitive Carrier, 85 FCC 2d 1, 14 (1980).

[4]Competitive Carrier, 77 FCC 2d 308, 316 (1979).

[5]Re Inter- and IntraLATA Intrastate Competition, 60 PUR 4th 24, 39-40 (Ky. PUC 1984). See also, Re Competitive Intrastate Offerings of Long Distance Telephone Service, 86 PUR 4th 57, 61 (N.C.U.C. 1987).

> be printed in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date;
> The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.[6]

The Commission in its NPRM is not proposing any rule that would be in conflict with the Communications Act. In fact the language of the statute is very clear. The Commission under Section 203 of the Communications Act may change its tariff filing requirements. Section 203 only requires that a tariff be filed. The specific tariff filing requirements may be determined by the Commission. This enables the Commission to modify any and all tariff requirements for carriers "by general order applicable to special circumstances or conditions."[7] The special circumstances in this situation are numerous. First and foremost, the Commission has repeatedly determined that nondominant carriers do not have market power. Secondly, the previous forbearance policy helped develop competition in the interexchange market and gave customers more choices.

The United States Court of Appeals supports the Commission's ability to modify tariff filing requirements set out in the Commission's rules. The Court stated "In short, under Section 203(b) the Commission may only modify requirements as to form of, and information contained in, tariffs and the thirty

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[6]47 U.S.C. 203(a) and 203(b)(2).

[7]47 U.S.C. 203(b)(2).

days notice provision."[8] The Commission can and should adopt its proposed rules for nondominant carriers.

II. The Proposed Rules Should Apply to Operator Service Provider Tariffs

At a minimum, the proposed rules to give carriers formatting flexibility in filing tariffs and tariff revisions on diskettes should apply to nondominant common carriers who provide operator services. Currently, informational tariffs of operator service providers are filed on one days notice. To reduce administrative burdens and filing fees, nondominant common carriers should be able to incorporate its operator service tariff filing into one interstate tariff. Having different formatting and filing responsibilities for the operator service section is burdensome and unnecessary.

III. The Tariff Filing Requirement Must Apply Prospectively

The Commission must make clear that the decision by the Court of Appeals in AT&T v. FCC[9], vacating the Fourth Report[10] of the Competitive Carrier proceeding has prospective effect only. The Commission has recognized that a prospective tariff requirement would be the only lawful way to proceed should it find that a tariff requirement is necessary at all. In AT&T

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[8]AT&T v. FCC, 487 F. 2d 864, 879 (1973). See also, AT&T v. FCC, 503 F. 2d 612, 616-617 (1974).

[9]978 F. 2d 727 (D.C. Cir 1992), rehearing en banc denied, January 21, 1993.

[10]95 FCC 2d 554 (1983).

Communications v. MCI Telecommunications Corp.[11], the Commission dismissed AT&T's complaint that challenged the lawfulness of the offering by MCI of interstate telecommunications services under rates and terms not contained in a tariff filed with the Commission. The Commission ruled:

> MCI's conduct, in this regard, at all times complied with what the Commission, in the Fourth Report and Order, has said MCI may do, i.e., provide interstate telecommunications services at rates and on terms that are not contained in tariffs on file with the Commission. . . . Under these circumstances, it would be manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, which the Commission explicitly approved in advance, may give rise to a finding of liability.[12]

The Commission has previously relied on the same reasoning in refusing to hold carriers liable for actions which were permissible at the time they were taken. For instance, in MCI v. AT&T[13] the Commission refused to apply its Resale and Shared Use decision to AT&T conduct that occurred prior to the issuance of the decision. The Commission explained that while it had "concluded that restrictions on resale and shared use were violative of Sections 201(b) and 202(a) of the Communications Act," since AT&T's action of restricting resale occurred prior to the announcement of that policy, "it would be unfair to

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[11]7 FCC Rcd 807, 809 (1992).

[12]Id. Citing Arizona Grocery v. Atchison, Topeka and Santa Fe Railway Co., 284 U.S. 370, 389 (1932); Nader v. FCC, 520 F. 2d 182, 202-203 (D.C. Cir. 1975); Bowen v. Georgetown University Hospital, 109 S. Ct. 468, 480 (1988).

[13]74 FCC 2d 184 (1979).

give Resale and Shared Use retroactive application because the findings of unlawfulness are related to a determination of new policy."[14]

The Commission's refusal to apply new policies and rules against those who relied upon old policies and rules is consistent with Supreme Court authority that laws generally should not be applied retroactively.[15] Consistent with Supreme Court precedent, the Second Circuit admonished the National Labor Relations Board that "a decision branding an 'unfair' conduct stamped

of a statute, "an agency may not impose liability retroactively when the individual has acted in accordance with the agency's own announced interpretation of the statute."[19] The D.C. Circuit has also explained that "[a]lthough an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed . . . and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect."[20]

For the past ten years, the Commission has permitted, even encouraged, nondominant carriers to provide interstate services without filing tariffs. Under Supreme Court and the Commission's own precedent, a tariff filing requirement on nondominant carriers should have prospective effect only. The Commission must make clear that nondominant carriers who have relied on its forbearance policy are not liable for providing services pursuant to that policy.

Conclusion

The Commission should adopt its proposed rules for nondominant common carriers to streamline, to the greatest extent possible, the tariff filing requirements. The Commission should also allow nondominant carriers to incorporate operator service tariff filings into one interstate tariff and adopt the

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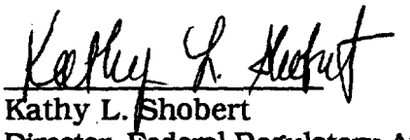
[19]Id at 248.

[20]RKO General, Inc. v. FCC, 670 F. 2d 215, 223-224 (D.C. Cir 1981)(quoting Boston Edison Co. v. FPC, 557 F. 2d 845, 849 (D.C. Cir. 1977)), cert. denied, 456 U.S. 927 (1982).

formatting flexibility proposed herein for operator service tariff filings. Further, the tariff filing requirement must apply prospectively.

Respectfully submitted,

GENERAL COMMUNICATION, INC.



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March 29, 1993

## STATEMENT OF VERIFICATION

I have read the foregoing, and to the best of my knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on March 29, 1993.

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